IN THE

Supreme Court of the United States

October Term, 1956.

No. 768.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Appellee, the Board of Directors of City Trusts of the City of Philadelphia, respectfully requests this Honorable Court to reconsider its *per curiam* decision rendered April 29, 1957, and either (1) to vacate so much of the *per curiam* order as granted appellants' petition for certiorari and reversed the judgment below, and to dismiss the petition for certiorari as improvidently granted, or (2) in the

alternative to vacate so much of the order as reversed the judgment below and place the case on the calendar for briefs and oral argument on the merits.

This Petition for Rehearing is filed for the following reasons:

(1) On a petition, and brief in opposition, devoted solely to whether the Court should review a judgment of the Supreme Court of Pennsylvania, this Court took jurisdiction *on the merits* of the cause and, without according the holder of that judgment the opportunity to present its case, summarily reversed the Supreme Court of Pennsylvania. In view of the importance of the issues involved, and of the admitted fact that prior to this case there has never been a decision on a similar set of facts, the case should not have been decided on the basis of briefs directed only to jurisdictional questions.

(2) The writ was improvidently granted. The Court's *per curiam* reversal of the judgment below is a holding that the trustee's compliance with the terms of the will of Stephen Girard was "discrimination by the state." This holding is not in accord with the prior decisions of this Court distinguishing state action from individual action. Appellee believes that because the parties were not heard on the merits, the Court, having been misled by Appellants' Jurisdictional Statement, misunderstood the nature of the trust and erroneously concluded that the City of Philadelphia had some function to perform in choosing the beneficiaries.

(3) It is apparent from the portion of this Court's opinion which stated that the Board which operates Girard College is an agency of the State of Pennsylvania for Fourteenth Amendment purposes that the Court misunderstood the organization of and functions performed by the Board.

STATEMENT OF THE CASE ON REHEARING.

By the Act of March 11, 1789, 2 Smith's Law, page 462 (53 P. S. § 6362 et seq.), a perpetual charter was given to the City of Philadelphia. By virtue of that charter the City of Philadelphia remains a corporation to this day (53 P. S. Historical Note, page 557). It was entitled "An Act to incorporate the City of Philadelphia." Section 2 (53 P. S. § 6362) provided, inter alia, "The inhabitants of the City of Philadelphia, as the same extends and is laid out between the rivers Delaware and Schuylkill, *be, and they, and their successors for ever, are hereby constituted a corporation* and *body politic, in fact and in law,* by the name and style of 'The Mayor, Aldermen and Citizens of Philadelphia', and by the same name shall have perpetual succession." (Emphasis supplied.) The Act of February 2, 1854, P. L. 21 (53 P. S. § 6361), changed the name of the corporation to "The City of Philadelphia", and increased its boundaries.

Stephen Girard died in 1831. He left the largest portion of his estate, in trust, to erect and maintain a "college" to care for "poor white male orphans" between the ages of six and ten years. By his Will he also provided that all the bequests and devises of his residuary estate were made upon the expressed condition that none of the monies, principal, interest, dividends or rents arising from the said residuary devise and bequest, "shall at any time be applied to any other purpose or purposes whatever than those therein mentioned and appointed." As further assurance that the funds would be applied only in accordance with his Will he included a clause forfeiting most of his estate to the United States should the estate be used by the City and Commonwealth for purposes other than those he specified.

Having created a perpetual trust it became necessary for Girard to name a perpetual trustee to administer it. In 1830 and 1831 there were no corporations which enjoyed

perpetual existence capable of administration of such a trust, other than the said "The Mayor, Aldermen and Citizens of Philadelphia", wherefore the selection of this "corporation and body politic" as trustee was essential.

The Board of Directors of City Trusts [created by the Act of June 30, 1869, P. L. 1276 (53 P. S. §§ 6481-6486), a further supplement to an act to incorporate the City of Philadelphia] took over the administration of the trust in 1870. Since that time the Board has exercised all the duties, rights and powers given by Girard's will except only the function of holding title to trust property.

As a "corporation and body politic" under the creating Act of March 11, 1789, supra, there can be no doubt that the City of Philadelphia acts in, or possesses, a triple capacity or triple character, exercising correspondingly three-fold functions, powers, rights and duties, which, although variously designated, may be classed as public or governmental; private, proprietary or municipal; and, finally, fiduciary.

Since 1739, when certain ground rents were devised by William Carter to the City of Philadelphia, as trustee for the use of the alms house and the relief of the poor until the present time, as trustee of some ninety charitable uses and trusts, including the Estates of Stephen Girard and Benjamin Franklin, the City of Philadelphia has acted in its fiduciary capacity and not in its sovereign, public or governmental capacity. For almost a century there has been a complete severance of the governmental and proprietary functions on the one hand from the fiduciary function on the other. The Board exercises no governmental powers, and the government of the City has no power over it. In short, the Board (fourteen community leaders from the Philadelphia area who serve without pay) is a trustee with power and authority no different from that of an individual or corporate trustee. As was said in the instant case (386 Pa. 548 at page 584):

"Perhaps equally important, Girard College was never administered by the City in its governmental or sovereign capacity. It was administered originally by the Mayor, Aldermen and Councils, and subsequently by an independent agency created by the Legislature *solely in the capacity of a fiduciary or trustee, governed, bound and limited by the directions and provisions of Girard's Will.*"

For 111 years the trustee has administered the trust in conformity with Girard's Will. Not once has it deviated from the terms of the Will, except when the investment restrictions imposed by Girard could not be carried out without rendering it impossible to continue the college. On each occasion when the Board has found it impossible to comply with a provision in the Will, it has requested instructions from the Orphans' Court of Philadelphia County. Each time that Court has based its judgment on an examination of the Will and a determination of Girard's intention. Never before this has the Board, the City, the Commonwealth or any court assumed or asserted the power to decide any question relating to the administration of Girard College except by reference to Girard's Will.

It was for this reason that the Board merely complied with the Will when it appeared that Foust and Felder were not within the class of beneficiaries chosen by Girard. Since in the last analysis the rights of the applicants, Foust and Felder, to share in the Trust proceeds depends upon the Will, it was to the question of the validity of the terms of the Will that the Pennsylvania courts turned their principal attention. They upheld the Will. This Court reversed *per curiam* upon a collateral Constitutional question concerning which this Court did not accept briefs or hear argument.

I.

In View of the Importance of the Issues Involved, This Case Should Not Have Been Reversed Without a Full Hearing on the Merits.

Since the *Civil Rights Cases,* 109 U. S. 3 (1883), this Court has been faced time and again with the problem of determining how far the right of an individual to be free of social restraints imposed by virtue of his race or color may be protected against the right of other individuals to express their own predilections. Intricately bound up in these cases are the first principles of government and the social order. The fundamental principle that every individual has certain basic rights that society must respect is a limitation on and frequently conflicts with the equally fundamental principle that, in a democratic society the majority shall rule. Accordingly, cases involving the Fourteenth Amendment, which has become the source of most of these rights, deal with matters of the most vital importance because of the inherent restrictions upon the very purposes of government.

Traditionally, most Fourteenth Amendment cases have involved only a conflict between an asserted individual right and the power of society, as an organization, to interfere with it. Rights of other individuals have rarely been involved. The obvious reason for this is that the Fourteenth Amendment has been interpreted to restrict only the action of the state. This has made it unnecessary to answer the host of questions which must arise if that Amendment were interpreted to apply to individual action. By now it is easy enough to say that the state cannot interfere with a person's basic rights. Since the state is an impersonal body, no one ordinarily becomes overly concerned that any "rights" which the state itself has may be restricted by such decisions.

Where the state is not alone involved, however, it is a very different matter. At that point protection of one man's freedom from restraint must be weighed against another man's freedom to act. Such cases do not merely involve the right of the one to be free of restraint by the state, but the right of the other to act, and to be protected in his acts by the state.

In *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955), where this Court held *two* full hearings on the issues and concluded by dismissing certiorari and vacating its first opinion, Mr. Justice Frankfurter, speaking for the Court, candidly and briefly stated at p. 72:

> "Only if a State *deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment* can its protection be invoked. Such a claim involves the threshold problem whether, in the circumstances of this case, what Iowa, through its courts, did amounted to 'state action'. *This is a complicated problem which for long has divided opinion in this Court* . . . Were this hurdle cleared, the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment, *would in turn present no easy constitutional problem.*" (Emphasis supplied.)

Once again such a case is before this Court.

Even if it clearly involved state action only, it is nevertheless in a field which demands the most careful attention. But the state is not alone involved. Appellants have asserted the right to be free of racial discrimination *practiced by the state*. Appellee asserts that *no such discrimination* exists here and stresses the right of an individual to dispose of his property at his death as he wishes. Against the right asserted by appellants, appellee has earnestly advanced the right to endow a private institution benefiting a limited number of people, the right

to make a will, and the right to create a trust and have it carried out in accordance with its terms. The collision between the rights asserted raises questions which have never been decided before. They are of the utmost importance, not only to those directly interested in Stephen Girard and his "college", but also to all persons who believe that the rights appellee asserts are worthy of the same protection afforded to appellants' rights.

Appellee submits that, where a case is both novel and involves fundamental constitutional rights, fairness should dictate the fullest possible hearing and the most careful consideration of *all* the rights involved. Appellee's brief filed with this Court considered jurisdictional questions only. It was not supposed to, and did not, deal with the merits of the federal questions involved, other than to set forth in the briefest possible summary of three pages why, in appellee's opinion, the federal question had been correctly decided below. Appellee has in effect been silenced before it could utter a word or submit an argument in defense of the conclusion reached by the judges of the Supreme Court of Pennsylvania and of one of the Commonwealth's finest lower courts.

In contrast, the decisions of the Pennsylvania courts were based on the most extended oral and written arguments. There were two full hearings in the Orphans' Court, one before the auditing judge and one before the six Orphans' Court judges sitting en banc. Although expressing serious doubts as to the standing of some of the appellants even to be heard (Record, 181a), that court heard oral argument and received briefs of each appellant. The Supreme Court of Pennsylvania allowed appellee to file two briefs and not only received briefs from the appellants but also accepted a brief from an amicus curiae, the Philadelphia Fellowship Commission, which sided with appellants. It is significant that only one of the twelve state court judges came to the same conclusion as this Court. This, at the very least, shows beyond question what was apparent from the

beginning of this case—that reasonable men, men of the highest repute, can honestly differ on questions involving fundamental rights, and that this case was not so easy to decide that it warranted *per curiam* reversal without allowing appellee to be heard.

The state courts decided the matter only after all sides of the question had been presented in full. This Court has reversed the judgment of the highest court of Pennsylvania, without permitting it to be defended, on issues which, it is submitted, are of the utmost significance. Appellee cannot find a single precedent for such a result. The action of this Court is contrary to the views stated in the *Rice* case, *supra*, on the importance of these questions. Appellee believes that in the history of this Court it is the first party to have had its case reversed without a hearing on the basis of a new approach to fundamental constitutional law.

The *per curiam* opinion of this Court states that the Board operates Girard College; that the Board is a state agency; and that, therefore, the case is covered by *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954). It appears from these six lines that this Court treated this case as simply another segregation case, which it is not.

None of the school segregation cases involved private property. The only cases involving both racial distinction and private property that appellee has found are *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Barrows v. Jackson*, 346 U. S. 249 (1953); and *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955). While private property was involved in each of those cases, none of them is even remotely similar to this case.

Nor did the school segregation cases, or any other Fourteenth Amendment case of any description, involve a public body acting only in a fiduciary capacity. In this respect, if in no other, this case is unlike any before it. In the extensive arguments made to the Pennsylvania courts, none of the parties were able to cite a single authority directly to the point. Appellee cannot believe that the

fiduciary element is so insignificant as not even to merit a hearing. The fact that a public body is connected with private property solely by way of administration of a trust raises a host of questions that cannot be disposed of simply by a reference to *Brown v. Board of Education of Topeka, supra.*

Is a trustee who does what his decedent directs him to do no different from a public body which does what the state commands? If identity is found in these two situations merely from the fact that a public body appears in both cases, is not substance being ignored and form exalted? Is it consistent with our fundamental legal precepts to permit a public body, which has solemnly accepted private property and agreed to administer it in accordance with the owner's wishes, to appropriate that property to its own uses? The answers to these and other questions may vary, but the questions persist.

It may be easy to understand that, where state or local governments provide facilities, whether they be for education, recreation or other services, out of taxes paid, either directly or indirectly, by all of the races, white, black, red, brown or yellow, that they and their children should participate in and enjoy all the benefits which flow therefrom on equal terms. But such is not the Girard case. Girard College is not in any sense a public school. It was not built nor has it ever been maintained by any state or local funds, whether from the money of taxpayers of all races or otherwise. It is what Girard called it in the codicil to his Will, dated June 18, 1831, an "orphan establishment". The beneficiaries of Girard's bounty down through the years have not been determined, nor are they now determined by the Commonwealth of Pennsylvania nor by the City of Philadelphia nor by any court, local or supreme, but solely by Girard himself in the exercise of his undoubted right to dispose of his own property by will, and in so doing, to say who shall enjoy its benefits. That is now and always has been the law of Pennsylvania.

Is this Court proclaiming that it is not the law of the United States? Until this Court's *per curiam* opinion lawyers believed that the due process clause of the Fourteenth Amendment was a solemn constitutional guarantee that governmental bodies—organizations which of necessity are swayed by the political temper of the times—could not change to suit the purposes of the State the disposition an individual made of his own property. Until this Court's *per curiam* opinion there was just as strong a belief that if the State created an agency to administer charities, as Pennsylvania created the Board of City Trusts, the agency was bound by the Constitution to administer all trusts in accordance with their terms and not to change their terms better to suit the State. If the agency deviated from that policy of consistency, if it administered eighty-nine trusts in accordance with their terms but refused to follow the directions in one such as Girard's, then the State would have denied to Girard the equal protection of the laws. Should these fundamental concepts so important to free men in a free society have been wiped out by the highest court in the land without so much as a hearing upon their application?

In support of its *per curiam* decision this court cited *Brown v. Board of Education of Topeka, supra.* That was the case involving those state laws which required segregation in public schools. The decision, which held such laws unconstitutional in that they were discriminatory and therefore denied equal protection to all persons, does not support the court's decision here. In principle the *Brown* case requires the opposite result from the one the court reached in this case. Here the City of Philadelphia and the State of Pennsylvania are attempting to "discriminate" against the privately endowed orphanage of Stephen Girard because it is not run in accordance with the policy of integration adopted by Pennsylvania. Because Stephen Girard is by the present-day standards of those holding office in Philadelphia and Pennsylvania a non-comformist, the

City and State would deny to him the right to have his will enforced, a right which other persons in this State are allowed to enjoy. We respectfully submit that the spirit of the *Brown* case should have led this court to the conclusion that those in political power in this country may not govern with inequality, i.e., may not "discriminate", simply because such inequality of treatment serves the end they would like to attain.[1]

It cannot be said of the petitioners in the Girard case, as it was of the children in the *Brown* case, that failure to admit them will have a tendency to retard their educational and mental development or deprive them of an education. The public school system is open to them on exactly the same basis as it is to all other children of Philadelphia. They will not be sent to segregated schools or forced to accept facilities allegedly "separate but equal." They will be at one with the vast majority of Philadelphia children who for one reason or another cannot enter Girard College.

The instant case can be still further differentiated from *Brown v. Board of Education of Topeka, supra.* In that case the admission of negroes to public schools could not deprive white children of an education. But in this case,

1. Stephen Girard exercised unusual foresight. He visualized the possibility that the political heads of the City and State might at some time be tempted to use the large resources of his estate for their purposes and not for the purposes Girard specified. He therefore provided for forfeiture of most of his estate to the United States should that contingency occur (Clause XXIV, paragraph 3). Such forfeiture clauses are valid and binding. *Charlotte Park and Recreation Commission v. Barringer,* 242 N. C. 311, 88 S. E. 2d 114, *cert. denied,* 350 U. S. 983 (1956). The auditing judge in this case has already stated that if the case were returned to him he would have to decide the applicability of that clause, a problem which was moot in view of his decision upon the constitutional question. *Girard Estate,* 4 D. & C. 2d 671, 701-702 (1955). Thus, in their attempts to force the application of their ideas of what is right and wrong for Girard College upon the trustee, the City and State may have in effect destroyed the institution. Again we most respectfully ask, does justice require that a party be denied the opportunity to argue its case when the decision against it raises even the possibility of such a catastrophy?

if the courts of Pennsylvania were to admit the petitioners, they would displace boys who fully qualify under the Will and who would thereby be denied the right to attend the orphanage. It is an accepted fact that there is no lack of beneficiaries who meet all the qualifications of the testator's Will. Thus, the "poor white male orphans" who might lose their right to attend have standing to enforce the trust. *Wiegand v. The Barnes Foundation*, 374 Pa. 149 (1953). *Restatement of the Law of Trusts*, Sec. 391.

In addition to private property and fiduciary powers, this case, as has been shown above, involves a will. In this respect, too, the case has no precedent. Girard College is not a part of the school system. It was created by a will and it is still operated in accordance with the terms of that Will. It may be difficult to believe that, after the lapse of over 100 years, the orphanage really is administered in accordance with the terms, including the peculiar terms, of a Will written in President Jackson's administration. Girard banned priests and ministers from the college grounds at a time when Deism was popular enough to be accorded respect. Religious thinking has changed in the century since that time, but priests and ministers, even those who are graduates of the orphanage itself, are still not permitted to set foot on the grounds. This may appear extraordinary. It is perhaps incredible that the living should respect the wishes of the dead with such devotion. Girard College has been administered in this manner because those closest to it, its students and alumni, believe that they owe their education to Stephen Girard and insist that his wishes be respected. These students and alumni do not understand how a momentous change in Girard's Will and in the operation of the college can be effected without a hearing. Nor can others, to whom a respect for wills is meaningful, see the similarity between the segregated public schools of the *Brown* case and an institution created by the will of a single individual for the benefit of certain persons only.

Finally, the case involves a charitable trust. It deserves a hearing on the question of how the expanding scope of the Fourteenth Amendment affects the right of a man to bestow his wealth upon selected groups. Charitable trusts were once invalid as against public policy, albeit that policy had no similarity whatever to the public policy which this Court is now enforcing. Undoubtedly, the decisions holding charitable trusts valid, and determining that charities could exist for the benefit of selected classes of persons, were the products of liberal thinking. If this thinking is now in the process of running full circle, it is a vitally important matter that merits the fullest consideration by this Court. In its Motion to Dismiss appellee urged a distinction between discrimination and selectivity. It is submitted that a hearing should be granted on the question whether, other factors being equal, the necessary selection made by one who endows or aids a charity, is discrimination and subject to the prohibitions of the Fourteenth Amendment. Appellee urges that this, too, is a new and important question which should not be summarily answered without permitting both sides to be heard.

This case is not a public school segregation case and it cannot in any conceivable way affect the law of such cases. The several important questions raised affect the law of wills, the law of trusts, and the law of charities. They affect one of the largest private charitable trusts in the United States. They affect ninety other charitable trusts administered by this trustee, and an untold number throughout the country. Appellee respectfully submits that it should be granted its day in this Court and the opportunity to present its case.

II.

This Court's Decision That the Board's Administration of the Girard Estate Violates the Fourteenth Amendment Is in Error, and the Petition for Certiorari Should Be Dismissed.

The summary determination of this Court that the City of Philadelphia could not administer the trusts created by the Will of Stephen Girard, deceased, as drafted by the testator overruled two of its prior decisions as well as many by the courts of Pennsylvania. This Court upheld the Will and affirmed the power of the City of Philadelphia to administer the trusts in *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127 (1844), and *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1 (1868). To the same effect are the decisions of the Supreme Court of Pennsylvania, *City of Philadelphia v. Girard Heirs*, 45 Pa. 9 (1863); *Philadelphia v. Fox*, 64 Pa. 169 (1870); *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545 (1936). A similar will was upheld in *Perin v. Carey*, 65 U. S. (24 How.) 465 (1860). The overruling of the earlier consistent line of cases involving this very estate was accomplished without even hearing from the parties on the merits of the questions presented.

But aside from these precedents, the determination that the Board of City Trusts violates the Fourteenth Amendment by its administration of the trusts set up by the Will of Stephen Girard, deceased, is entirely contrary to this Court's other decisions in the field. In *Shelley v. Kraemer*, 334 U. S. 1 (1948), Mr. Chief Justice Vinson succinctly set forth the purpose of that amendment at p. 23:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of

basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

Before the Fourteenth Amendment can be invoked, it is necessary to show the existence of a right independent of the Amendment and its violation by an act of the state. *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955); *Twining v. New Jersey*, 211 U. S. 78 (1908); *United States v. Cruikshank*, 92 U. S. 542 (1875). In *Brown v. Board of Education of Topeka, supra*, the right of the plaintiffs to attend public school was admitted. But in this case no effort has been made to establish the right of these applicants to attend Girard College existing independent of the trusteeship.

The legal basis for the admission or non-admission of the present applicants is the Will of Stephen Girard, who had the right under the law of Pennsylvania to leave his property to whom he saw fit. *Johnson Will*, 370 Pa. 125, 87 A. 2d 188 (1952); *Wetzel v. Edwards*, 340 Pa. 121, 16 A. 2d 441 (1940). He did not choose to benefit the petitioners. Of this, they can have no complaint since there was no obligation on Girard's part to include them in his bounty. Therefore the Board, as trustee, is not depriving them of any right when it follows the dictates of the Will.

The instant case differs markedly from all others in which this Court has held a governmental body engaged in state action. This is a case of a municipality's "agent," which has no governmental powers whatever, merely administering a trust. Its powers and duties are not set forth in a constitution or charter or an act of assembly. They were not established by the vote of the people or their representatives. They derive solely from the will of a private individual, Stephen Girard. Furthermore the funds them-

selves are not the fruits of taxation nor outright gift but were devised and bequeathed to the trustee for specific purposes. These objects were fixed by the testator, not by an act of the municipal governments. The Board differs in no wise from other trustees.

In the quoted passage from the *Rice* case above, Mr. Justice Frankfurter noted the searching question of whether, in any given case, "state action" is involved. Appellee believes that this question is important not merely because the Fourteenth Amendment is limited by its terms to state action, but because any broader application involves an interference with individual rights that may be more destructive to some individual liberties than protective of others. In determining what the state cannot do, therefore, it is crucial that private rights not be obliterated. No one seriously controverts this. But like every other case it is necessary to balance the considerations on both sides and to make distinctions which, though only of degree, are nevertheless required by the Fourteenth Amendment.

The position of the Board in the administration of Girard College is that of an agent for a private individual. If, in directing which of millions of needy persons his estate should be used to benefit, Stephen Girard must be branded a discriminator, it is he and not the Board which discriminates. The Board obeys the commands of the Will, not the dictates of the state or any other public body. It deals with private property and administers a private trust. The City has never dealt with the Girard Estate as other than private property. The complete separation of the Board from the City government is a clear demonstration of the special function served by the trustee. It is not the Board which offers education to the limited number of boys that the college can accommodate, just as it is not the Board which denies clerics the right to visit the college. Both are done by the Will of Stephen Girard.

The Board does no more than carry out Girard's Will. It does no more than the Register of Wills of Philadelphia County when he admits a will to probate and grants letters testamentary, or when he appoints an administrator, who is just as clearly an agent of the state, to administer the estate of an intestate. Nor does the Board act differently from the Orphans' Court when it adjudicates the account of a fiduciary appointed in a decedent's will and orders that his estate be distributed in accordance with that will.

All of this is state activity. But is it "state action" which cannot be allowed if the decedent wills his estate to persons described by race, color or creed? Race distinctions are not the only ones prohibited by the Fourteenth Amendment. It is startling for a person devoted to one religion to realize that he may not be able to receive the aid of the state in leaving his property to his own church, and without that aid, his wishes cannot be carried out.

There was a time when the functions of the state in the lives of individuals were so limited that "state action" was relatively easy to define. That is no longer the case. Mr. Justice Bromley, writing for the New York Court of Appeals in *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), cert. denied 339 U. S. 981 (1950), noted both the growth of government activities and the limits which must, as a result of that development, be placed on "state action."

> "The evolution of our society has disclosed State action where doubtless it would not have been found in an earlier day. Institutions created to meet the social and industrial necessities of our times do not respond readily to the simple test enunciated in *Ex Parte Virginia* . . . . Those considerations might suggest the desirability of holding that the test can be satisfied, and State Action discerned, in any case where the State has tolerated discrimination respecting a matter of high public importance. Invocation of the Constitution then might depend upon a balance of the two

values asserted—here the privilege of Metropolitan and Stuyvesant as against the right of appellants to equality of treatment.

"Such a development in constitutional law would clash with a fundamental policy inherent in the Fourteenth Amendment and the decision of the *Civil Rights Cases* . . . The unquestioned value of that system suggests the limits to the expanding concept of State action, which has hitherto been found only in cases where the State has consciously exerted its power in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State.

"The State of New York has consciously and deliberately refrained from imposing any requirement of nondiscrimination upon respondents as a condition to the granting of aid in the rehabilitation of substandard areas. Furthermore, it has deliberately refrained from declaring by legislation that the opportunity to purchase and lease real property without discrimination is a civil right. To say that the aid accorded respondents is nevertheless subject to these requirements, on the ground that helpful cooperation between the State and the respondents transforms the activities of the latter into State action, comes perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment. Tax exemption and power of eminent domain are freely given to many organizations which necessarily limit their benefits to a restricted group. It has not yet been held that the recipients are subject to the restraints of the Fourteenth Amendment.

"The increasing and fruitful participation of government, both State and Federal, in the industrial and economic life of the nation—by subsidy and control

analogous to that found in this case—suggests the grave and delicate problem in defining the scope of the constitutional inhibitions which would be posed if we were to characterize the rental policy of respondents as governmental action. To cite only a few examples: the merchant marine, air carriers, and farmers all receive substantial economic aid from our Federal Government and are subject to varying degrees of control in the public interest. Yet it has never been suggested that those and similar groups are subject to the restraints upon governmental action embodied in the Fifth Amendment similar to the restrictions of the Fourteenth upon the States. We do not read the language in *Steele v. Louisville & Nashville R. R. Co.*, . . . as implying such a suggestion. Such restraints as have been imposed upon their freedom of action are derived from statute, common law, and we feel that those sources of control are the most appropriate.

"We are agreed that the moral end advanced by appellants cannot justify the means through which it is sought to be attained. Respondents cannot be held to answer for their policy under the equal protection clauses of either Federal or State Constitution. The aid which the State has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question." (at pp. 534-36)

Appellee does not believe that "state aid" can become synonymous with "state action" without entirely destroying the right of an individual to live his life as he wishes. There is virtually nothing that an individual does today that does not involve the state in some manner. If a group of people gather together for charitable purposes, it is the state which is their conservator, being the guardian of all charities. It is the state which grants them a charter if they wish to incorporate. The state organizes and controls the

police and fire departments which protect their property, and grants them access to courts to protect their rights. But if the presence of the state in these ways is "state action", this group cannot found a Roman Catholic convent for Catholics only, or give scholarships to Methodist schools only, or organize a society for the care of Indians in a western state, or devote its resources to the betterment of the negro race. Nothing would be more contrary to our social development and to our fundamental principles.

No one has yet suggested that the Fourteenth Amendment or the *Brown* case, which prohibits the state from using its power to discriminate among races, deprives an individual of the right to express his preferences, even though they be racial, or to associate with whom he wishes. This is as much a right of freedom of expression as is the right to speak freely on political issues. The state is the only body that can adequately protect the right of a person to speak as he wishes, whether or not others agree with what he says. In protecting that right the state is not passing upon the merits of what is said. It is merely carrying out, impartially and fairly, its duty to afford to every citizen an equal protection of the right of free expression. The same is true when the state affords equal protection to the fulfillment of a person's last will. *All that the equal protection clause demands, and to a large extent all that the due process clause permits, is that the state say to every person that his will, whatever it may contain, will be honored.* In the case of charities, all the Constitution requires is that every charity be treated equally.

The Commonwealth of Pennsylvania and the City of Philadelphia have accorded to Stephen Girard the right to have his Will carried out. The same protection is given to every other citizen of Pennsylvania. If the Board were prohibited from acting as trustee of trusts for the benefit of colored children, or if the Board were empowered to carry out trusts for the benefit of poor white male orphans only, there would clearly be a discrimination by the state

and an unequal protection of rights. But the Board exists for the benefit of every citizen. It is authorized to, and does, act as trustee for any person who desires the City to be trustee for a charitable purpose, and carries out with equal diligence the terms of every such trust. It is not responsible for and does not pass judgment on the terms of the trusts. It exists and acts as the agent of anyone desiring its services, and there has never been the shadow of a claim that it offers its services in any discriminatory manner whatever.

This is not a situation where individuals are engaged in what is normally done by government, as in *Marsh v. Alabama*, 326 U. S. 501 (1946); *Smith v. Allwright*, 321 U. S. 649 (1944); *Nixon v. Condon*, 286 U. S. 73 (1932). Nor is the City forcing discriminatory conduct on those who do not desire to practice it. *Shelley v. Kraemer*, 334 U. S. 1 (1948). This is not an attempt to bar the petitioners from a municipally owned, tax supported institution either directly as in *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954); *Kerr v. Enoch Pratt Free Library*, 149 Fed. 2d 212 (4th Cir. 1945), or by subterfuge, as in *Muir v. Louisville Park Theatrical Association*, 347 U. S. 971 (1954). This is a case of a municipality using the funds of an individual for the purposes which he specifically prescribed.

To find "state action" wherever the state participates and regardless of the nature or degree of that participation is to dwell upon and overemphasize a phrase which does not even appear in the constitutional provision which it seeks to define. The Fourteenth Amendment says nothing about "state action", which is simply a shorthand way of drawing a necessary line. This should not obscure the actual language of the Amendment that no state shall "deny" the equal protection of the laws. In providing a trustee, in probating wills and distributing estates, and in protecting charities the state is not denying equality to any person. It provides facilites only, and these facilities are open to all. It takes no part in determining who shall receive the bene-

fits of trusts and wills or the generosity of charities. These are, as they have been, private matters.

Appellee suggests that some line must be drawn between individual action and state action if freedom of individual expression is to survive, and if the equal protection clause is not to eat away at the due process clause by denying the right of free expression. Appellee believes that in accordance with prior decisions it is proper to draw that line where it is the individual, not the state, which is the source of what is being expressed. In such cases, if all the state is doing is furnishing protection to the right of individual expression, and if that protection is equally available to all, the state should not be deemed to be acting contrary to the Fourteenth Amendment. Otherwise the freedoms of expression guaranteed by that same Amendment will be in jeopardy. The Board of Directors of City Trusts believes that it is not engaged in "state action" as that term has been heretofore applied. The writ was improvidently granted. It is respectfully submitted that certiorari should be denied.

III.

There Should Be a Hearing to Consider the Nature of the "Agency" of the Board of City Trusts.

The brief *per curiam* opinion of this Court deals solely with the competency of the Board of City Trusts to act as Stephen Girard's trustee. This Court did not declare any provision of the Will invalid, and it did not say that appellants, Foust and Felder, have a right to attend the orphanage or are to be admitted to it. The order remanded the case for further proceedings, meaning simply that the Pennsylvania courts must take such procedural steps as are necessary to carry out the intent of Stephen Girard in the light of this Court's decision that *this trustee in its present capacity* may not carry out the Will. If these statements in any way indicate a misunderstanding of the

opinion, then assuredly a hearing should be held so that the matter may be clarified.

Thus, while we recognize that the opinion does not make any changes in the substantive provisions of the Will, nevertheless the decision is of such far-reaching significance, not only to this trustee but to others similarly situated, that it calls for the most careful consideration by this Court to determine whether the relationship between the Board of City Trusts and the City of Philadelphia is what this Court, without having heard argument on the matter, assumed it to be. The fact is that the Board of City Trusts while admittedly an "agency of the State of Pennsylvania" is no more, is in fact less, such an "agency" than are many other corporate trustees. It was created by statute just as other corporate trustees are created. It is an "agency" of government in precisely the same way as are other corporations. It has the same powers to administer trust properties as do other trustees, no more and no less. Thus, a decision concerning the capacity of the Board is a decision concerning the capacity of all trustees whose existence stems from the authority of the State, and that means virtually all trustees. We sincerely believe that the Appellants' Jurisdictional Statement led this Court to the erroneous conclusion that the Board is a trustee different from other trustees. We believe that the repeated statement that the courts of Pennsylvania have carved out a new exception to the concept of "state action" under the Fourteenth Amendment may have influenced the Court. We have not been afforded the opportunity of explaining the functions of the Board or of discussing the position the Board occupies under Pennsylvania law, something that is only too familiar to the Pennsylvania judges but which the justices of this Court might well have misunderstood. A hearing on the merits would give the opportunity to clarify this situation.

At this time it is not possible to treat the problem as fully or as carefully as its implications warrant. That

must wait until the opportunity is given to present this case on the merits. One specific example should, however, point up the problem and the very extreme changes which the *per curiam* opinion may have unwittingly brought about. Banks are creatures of legislation. It is fundamental, for instance, that National Banks are "instrumentalities of the Federal Government, created for a public purpose . . ." *Smith v. Witherow,* 102 F. 2d 638, 641 (3rd Cir. 1939). They are, in short, "agencies" of the United States, just as the Board of City Trusts is an "agency" of the City of Philadelphia and hence of the State of Pennsylvania. In fact, the Federal Government has far more power to control the workings of its national banks than has the City of Philadelphia to control the Board of City Trusts. The words "City of Philadelphia" appear in the Board's title, but the governing bodies of the city do not and cannot control the Board in any respect whatsoever. The Board must answer to the Orphans' Court as must other trustees. Since the law applicable to one set of facts governs all similar sets of facts, lawyers representing National and State banks are gravely concerned by the rule of law announced in this Court's recent opinion. On the face of it the ruling that the Board of City Trusts, an "agency of the State of Pennsylvania," is not competent to administer Stephen Girard's trust, is also a ruling that National Banks, "agencies" or "instrumentalities" of the Federal Government, and that State banks, "agencies" or "instrumentalities" of the State, are incompetent to serve under similar circumstances.

If it is a denial of equal protection of the laws for a trustee to refuse to make available to a negro the property in trust for whites, it is just as much a denial of equal protection of the laws for the same trustee to refuse to make available to a methodist property in trust for catholics. If two negro boys have standing to sue in order to claim the facilities of a trust for white boys, then two

methodist boys have standing to sue to claim the facilities of a trust for catholic boys, or two gentiles have standing to recover the proceeds of a trust for jews. The Fourteenth Amendment does not limit itself to race. It simply says that *no state* may deny the equal protection of the laws, and it means simply that *no state* and no state "agency" may set up one rule for whites and another for negroes, one rule for methodists and another for catholics, or one rule for gentiles and another for jews. These are the fundamentals upon which the doctrine of "state action" under the Fourteenth Amendment is based.

It follows that if the Board of City Trusts, because it is an "agency" of the State, may not administer a trust for whites only, by the same token it may not administer a trust for catholics only or for jews only. The same would follow for any agency of government in a position comparable to that of the Board. To use the example already mentioned, it would mean that no bank, National or State, could serve as trustee for such limited purposes. Thus, this Court's opinion may well mean that untold numbers of charitable trusts which are today administered by governmental "agencies" must either be re-written or the trustee replaced.

The decision creates an extremely delicate problem of the most vital significance. Fairness to the litigants and to the country as a whole demands that such important issues be decided only after the parties have been given their day in court. The problem in this case is not whether the Board of City Trusts is an "agency of the State of Pennsylvania"—admittedly it is that. The problem is whether it is the special kind of agency which in the words of Justice Cardozo is "the repository of official power" (*Nixon v. Condon*, 286 U. S. 73, 88) and which must therefore bestow no benefit nor impose any limitation unless it does so to all equally. It must conform to the equal protection clause of the Fourteenth Amendment only if it is

such a "repository of official power". That, we earnestly contend, The Board of City Trusts most certainly is not. In neither power nor function does it differ from other State "agencies" such as banks and trust companies. An argument on the merits will put these matters in their proper light. A decision as to the nature of the "agency" of the Board of Directors of City Trusts can be made only if the facts are before the Court. We submit that appellee should be given the chance to present those facts fully, dispassionately and with the care that the seriousness of the situation created by this court's *per curiam* opinion demands.

CONCLUSION.

The position which the Girard Will has come to occupy in the minds of the members of the judiciary and the bar is well illustrated in the following excerpt from the opinion of Judge Lefever of the Orphans' Court of Philadelphia County, when this matter was before it (*Girard Estate*, 4 D. & C. 2d 671, 708, 720-721):

> "The will of Stephen Girard has become a legend in Pennsylvania and in the United States. The number of times Girard's will and Girard College are referred to in the books is legion. The will is mentioned in every leading treatise on 'trusts'. Girard's will and the basic decision sustaining it are cited as illustrative of the doctrine of charitable trusts in America. The principle therein established, that a testator may dispose of his private property for the benefit of any class he may select, is firmly imbedded in the laws of this country.
>
> "As stated in Benjamin Franklin's Administratrix v. The City of Philadelphia, et al., 2 Dist. R. 435,

437: 'Stephen Girard's great estate, which now houses, feeds, clothes, and educates 1,500 orphan boys, would if any strained definition of the word "public" were allowed to prevail, be crippled by taxation; yet only a class, and that a small class of people can obtain the benefit of it. Girls are excluded; boys whose fathers are living, are excluded; men and women are excluded; in short, all but "poor white male orphans" are excluded. Nevertheless, it is a great charity, and withstood numerous and persistent attacks in the courts of Pennsylvania and of the United States, *until now it is fixed, firm, and as unmovable as a rock:* Vidal v. Girard's Executors, 2 Howard, U. S. 127; Philadelphia v. Girard's Heirs, 45 Pa. 9; Girard v. Philadelphia, 7 Wallace 1.'" (Emphasis the court's).

Aside from the great and historic interest in the Girard Will the question here presented is one of the first instance and of considerable importance in the field of fiduciary law. Diligence of counsel on both sides has failed to uncover a single case dealing directly with the question herein raised, the applicability of the Fourteenth Amendment to a state or municipal corporation when acting in a fiduciary capacity.

It is difficult to gauge accurately the impact of the decision in this case, as counsel cannot ascertain the number of trust funds administered by state and municipal bodies. The Board of City Trusts holds approximately ninety and there is no reason to think its position is unique. Over and above this, however, the opinion raises questions as to its applicability to such institutions as national banks, trust companies chartered by the several states and trustees appointed by the courts, as well as whether any charitable trusts enforceable by an attorney-general or administered under the jurisdiction of a state court can limit its beneficiaries because of race, creed, color or national origin.

Horace Binney, Esquire, in his superb and convincing argument in defense of Girard's Will before the Supreme Court of the United States (*Vidal, et al. v. The Mayor, Alderman and Citizens of Philadelphia, supra*), said, inter alia, "There is not a charitable society, nor an object of charity in Pennsylvania, nor an institution for the promotion of religion or literature, that is not to be affected by this decision. The magnitude of the estate in controversy disappears before the magnitude of the public interests involved. It is indispensable that we look to our foundations with more than usual care."

That truism so appropriate in 1844 is doubly so in 1957. The motion to dismiss and the brief filed in opposition to the petition for certiorari was not an attempt to set forth in full the position of the trustee in this matter. It was devoted to argument as to why this Court should not assume jurisdiction. What is now sought is an opportunity to set forth fully the reasons in support of the Will of Stephen Girard and its continued administration by the Board of Directors of City Trusts.

There is grave danger that the label "discrimination" may be placed unwittingly on a case which is in no sense deserves that label. History attests to the injustice of acting upon accusations baseless in fact. Use of the labels such as "infidel", "witch", or "traitor", have unquestionably caused serious invasions of the rights of those unjustly accused. This Court has been ever vigilant to protect the citizen against just such invasions. Today "discrimination" is a label. Throughout these proceedings appellants have repeated that label so often that they have successfully created the illusion that the case involves something it does not, i.e. "discrimination". Those persons who look with deep concern not only to the future of Girard's "orphanage" but also to their status as a trustee of charitable trusts identical in many respects to Girard's ask an opportunity to present their case, con-

vinced that by briefs on the merits and oral argument they will be able to establish to the satisfaction of this Court that theirs is not action which in any sense deserves the label "discrimination".

For all of the reasons stated above appellee requests the Court either to grant it a hearing on the merits of the case, or to vacate its decree and dismiss the Petition for Certiorari as improvidently granted.

Respectfully submitted,

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Attorneys for Appellee.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....
JOSEPH P. GAFFNEY, SR.

.....
OWEN B. RHOADS